

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

ACCEPTED/FILED

AUG 19 2013

Federal Communications Commission  
Office of the Secretary

In the Matter of:

Petition of Douglas Paul Walburg  
and Richie Enterprises, LLC  
for Declaratory Ruling to Clarify Scope and/or  
Statutory Basis for Rule 64.1200(a)(3)(iv)  
and/or for Waiver

CG Docket No. 02-278

CG Docket No. 05-338

PETITION OF DOUGLAS PAUL WALBURG AND RICHIE ENTERPRISES, LLC FOR  
DECLARATORY RULING AND/OR WAIVER

Samuel L. Feder  
Leah J. Tulin  
JENNER & BLOCK LLP  
1099 New York Avenue NW  
Washington, DC 20001  
(202) 639-6000 – Telephone  
(202) 639-6066 – Fax

*Counsel for Douglas Paul Walburg and  
Richie Enterprises, LLC*

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**PETITION OF DOUGLAS PAUL WALBURG AND RICHIE ENTERPRISES, LLC FOR  
DECLARATORY RULING AND/OR WAIVER**

Pursuant to Section 1.2 of the Federal Communications Commission (“Commission” or “FCC”) rules,<sup>1</sup> Douglas Paul Walburg and Richie Enterprises, LLC (collectively “Petitioners”) respectfully request that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission’s rules does not apply to fax advertisements sent with the prior express consent or permission of the recipient (“solicited faxes”). In the alternative, Petitioners respectfully request that the Commission clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). If the Commission declines to issue either declaratory ruling, Petitioners respectfully request that, pursuant to Section 1.3 of the FCC’s rules,<sup>2</sup> the Commission grant retroactive waivers of Section 64.1200(a)(4)(iv) with respect to faxes that have been transmitted by Petitioners with the prior express consent or permission of the recipients.

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<sup>1</sup> 47 C.F.R. § 1.2.

<sup>2</sup> *Id.* § 1.3.

## INTRODUCTION AND EXECUTIVE SUMMARY

Petitioners are small business owners currently facing class action lawsuits seeking multi-millions of dollars in damages because they sent faxes to customers who do not dispute that they had expressly consented to receive them. The basis for these lawsuits is the Telephone Consumer Protection Act (“TCPA” or the “Act”), which prohibits sending an “unsolicited advertisement” by fax and provides a private cause of action for violation of the statute or implementing rules promulgated by the FCC. The plaintiffs suing Petitioners rely on a regulation, Section 64.1200(a)(4)(iv), issued by the Commission in an order implementing amendments to the TCPA. That regulation requires that certain opt-out language appear on faxes, but its scope is unclear. It is part of a rule expressly limited to *unsolicited* faxes, but confusingly also references recipients *that have agreed* to receive such faxes. Uncertainty as to the meaning of Section 64.1200(a)(4)(iv), as well as whether it should be considered grounded in the TCPA, have led to disputes across the country and numerous petitions filed with this Commission.

Petitioners ask the Commission to resolve this uncertainty by clarifying that Section 64.1200(a)(4)(iv)’s ambiguous language should be limited to unsolicited faxes, as that reading best accords with the TCPA’s language and legislative history, and avoids an interpretation that would render the rule unlawful under basic principles of administrative law and the First Amendment. Alternatively, Petitioners ask the Commission to clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not the TCPA. Through either of these actions, the Commission can ensure that its rules are consistent with Congress’ intent, in addition to providing much needed guidance to courts and litigants. If the Commission declines to issue either declaratory ruling, Petitioners ask for retroactive waivers of Section 64.1200(a)(4)(iv) with respect to solicited faxes. Neither the Commission’s goals nor the public interest are served by subjecting

Petitioners' small businesses to multi-million dollar lawsuits from plaintiffs who have suffered no actual harm.

## BACKGROUND

The TCPA prevents the use of a telephone facsimile machine to send an “unsolicited advertisement.”<sup>3</sup> Since the passage of the TCPA in 1991, Congress has exempted solicited fax advertisements from regulation under the Act. Specifically, the TCPA defines an “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person *without that person’s prior express invitation or permission*.”<sup>4</sup> Through its enactment of the Junk Fax Prevention Act of 2005 (“JFPA”), Congress amended the TCPA to permit the transmission of unsolicited faxes to a person with whom the sender has an established business relationship (“EBR”) so long as such an advertisement contains an “opt-out” notice.<sup>5</sup> Importantly, however, the TCPA, as amended, continues to cover only fax advertisements that are transmitted without an individual’s “express invitation or permission.” Thus, by its terms, the TCPA’s general prohibition against fax advertisements and the exception to that prohibition (allowing faxes sent pursuant to an EBR if they contain an appropriate opt-out notice) simply do not apply to faxes transmitted *with* a recipient’s prior express consent.

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<sup>3</sup> 47 U.S.C. §§ 227(a)(5) & (b)(1)(C).

<sup>4</sup> *Id.* § 227(a)(5) (emphasis added).

<sup>5</sup> *Id.* § 227(b)(1)(C)(i)-(iii); see *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19,758 (2005) (“JFPA NPRM”) (explaining regulatory background of EBR provision). Congress left the definition of an unsolicited advertisement largely unchanged, simply adding a clause to clarify that express permission could be given “in writing or otherwise.”

Following the passage of the JFPA, the Commission sought comment on proposed implementing regulations and, in 2006, issued a final order (“*JFPA Order*”) that “amend[ed] the Commission’s rules on unsolicited facsimile advertisements.”<sup>6</sup> Despite the TCPA’s express limitation to unsolicited faxes, one of the rules adopted by the Commission, Section 64.1200(a)(4)(iv), references opt-out notices for faxes “sent to a recipient that *has* provided prior express invitation or permission.”<sup>7</sup> The scope of that provision is unclear, however, as it is confusingly worded as part of a rule that also references *unsolicited* faxes.<sup>8</sup> The *JFPA Order* also contains contradictory language regarding the scope of Section 64.1200(a)(4)(iv), simultaneously explaining that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements” and that an opt-out notice is required for solicited faxes “to allow consumers to stop unwanted faxes in the future.”<sup>9</sup> The administrative record sheds no light on the scope of the rule because the Commission never sought comment on applying the TCPA to solicited faxes. Although the Office of General Counsel has argued that Section 64.1200(a)(4)(iv) should be read to apply to solicited faxes, the Commission itself has yet to opine on the issue.<sup>10</sup>

Meanwhile, Section 64.1200(a)(4)(iv) has had unintended and unjust consequences, subjecting Petitioners – as well as numerous others – to lawsuits seeking damages for engaging in consensual communications with their customers that are entirely permissible under the

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<sup>6</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (“*JFPA Order*”); *see also JFPA NPRM*, 20 FCC Rcd 19,758.

<sup>7</sup> 47 C.F.R. § 64.1200(a)(4)(iv) (emphasis added).

<sup>8</sup> *See id.*

<sup>9</sup> *JFPA Order*, 21 FCC Rcd at 3810, 3812, ¶¶ 42 n.154, 48 (emphasis added).

<sup>10</sup> *See* Amicus Brief for the Federal Communications Commission Urging Reversal at 13-14, *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2012), 2012 WL 725733.

TCPA. Indeed, notwithstanding the fact that solicited faxes are expressly excluded from coverage under the TCPA, plaintiffs suffering no actual harm have seized upon Section 64.1200(a)(4)(iv)'s reference to solicited faxes to bring class action lawsuits under Section 227(b) of the TCPA, which authorizes a private right of action to recover statutory damages based on a violation of "this subsection or the regulations prescribed under this subsection."<sup>11</sup> Many of these lawsuits seek millions of dollars in damages, despite the fact that the plaintiffs fully and freely admit that they expressly agreed to receive the faxes.<sup>12</sup> Instead, these suits are premised solely on the fact that the fax advertisements at issue do not contain opt-out notices or contain opt-out notices that the plaintiffs deem inadequate.

Petitioners are defendants in two such suits. Mr. Walburg owns a small business that publishes a legal practitioner's reference manual sold in six states. His company sent one fax advertisement to the named plaintiff in the action, who has admitted that his office expressly agreed to receive the fax. Nevertheless, Mr. Walburg is now facing a putative class action alleging between \$16 and \$48 million in damages – an amount which would put him out of business – because faxes Mr. Walburg sent with express permission did not contain an opt-out notice.<sup>13</sup> As a result, Mr. Walburg now "faces a class-action complaint seeking millions of

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<sup>11</sup> 47 U.S.C. § 227(b)(3)(A)-(B).

<sup>12</sup> See, e.g., Anda, Inc. Petition For Declaratory Ruling at 2, *In re Petition for Declaratory Ruling to Clarify That 47 U.S.C. 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent*, CG Docket No. 05-338 (FCC Nov. 30, 2010) ("*Anda Petition*"); Petition of Staples, Inc. and Quill Corporation For Rulemaking and Declaratory Ruling at 6, *In re Petition of Staples, Inc. and Quill Corporation for a Rulemaking to Repeal Rule 64.1200(a)(3)(iv) and for a Declaratory Ruling to Interpret Rule 64.1200(a)(3)(iv)*, CG Docket No. 05-338 (FCC July 19, 2013) ("*Staples Petition*").

<sup>13</sup> The fax in question, along with others sent during the relevant time period, did not contain an opt-out notice because Mr. Walburg did not believe that such a notice was necessary if he had obtained the prior express consent of the recipient.

dollars even though there is no allegation that he sent a fax to any recipient without the recipient's prior express consent.”<sup>14</sup>

Richie Enterprises, LLC (“Richie”) is a Kentucky-based small business whose customers are pharmacies across the United States. Richie informs pharmacies of discount drugs or drug closeouts, connecting pharmacies with drug manufacturers. As in the case pending against Mr. Walburg, the named plaintiff in Richie's case has adduced no evidence that any faxes were sent without the express prior consent of the recipient. In addition, for some part of the period in question, the faxes sent by Richie did contain an opt-out notice, including a toll-free method for opting out, but that notice did not contain the precise language stated in Section 64.1200. Richie is now exposed to class action liability of between \$50 million and \$150 million without any evidence whatsoever that plaintiffs have suffered any actual harm. And like Mr. Walburg, Richie would be put out of business if faced with such liability.

Petitioners have argued to the courts that the TCPA cannot provide a basis for liability where, as here, the plaintiffs expressly agreed to receive the fax advertisements at issue. Mr. Walburg won on this ground in the district court, but the Eighth Circuit recently overruled that decision.<sup>15</sup> That court agreed with the Office of General Counsel that Section 64.1200(a)(4)(iv) should be read to apply to solicited faxes. Importantly, however, the Eighth Circuit in no way suggested that the Commission lacks discretion to read the rule differently.<sup>16</sup> The court also indicated that Mr. Walburg might obtain relief from the Commission.<sup>17</sup> Mr. Walburg has thus moved to stay the litigation until the Commission addresses this petition. Although the Richie

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<sup>14</sup> *Nack v. Walburg*, 715 F.3d 680, 682 (8th Cir. 2013).

<sup>15</sup> *See id.* at 687.

<sup>16</sup> *See id.* at 685 (“defer[ing]” to the interpretation proffered by the Office of General Counsel).

<sup>17</sup> *See id.* at 687 (“On remand, the district court may entertain any requests to stay proceedings for pursuit of administrative determination of the issues raised herein.”).

litigation is in a different venue (Missouri state court), Richie too has followed the guidance of the Eighth Circuit and sought a stay of litigation until the Commission rules on this petition.

## **ARGUMENT**

### **I. The Commission Should Issue a Declaratory Ruling to Eliminate Uncertainty Regarding the Scope of and Statutory Basis for Section 64.1200(a)(4)(iv).**

Congress has granted to the Commission the “sound discretion” to issue a declaratory ruling in order to “terminate a controversy or remove uncertainty.”<sup>18</sup> Here, there is both controversy and uncertainty over the scope of and statutory basis for Section 64.1200(a)(4)(iv). That uncertainty is confirmed both by the spate of lawsuits that have proliferated across the country involving solicited faxes and the numerous petitions that have been filed with the Commission.<sup>19</sup> Accordingly, the Commission should issue a declaratory ruling to clarify that fax advertisements transmitted after express consent was obtained from the recipient are not required to contain an opt-out notice, or, in the alternative, that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b).

#### **A. The Commission Should Clarify That Section 64.1200(a)(4)(iv) Does Not Apply to Solicited Faxes.**

The Commission should interpret Section 64.1200(a)(4)(iv) to apply only to unsolicited faxes for at least three reasons: (1) the plain language of the rule and the order promulgating that

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<sup>18</sup> 5 U.S.C. § 554(e); *see* 47 C.F.R. § 1.2(a) (“The Commission may. . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

<sup>19</sup> *See In re Southwestern Bell Mobile Sys., Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 19,898, 19,900 ¶ 5 (1999) (agreeing to issue declaratory ruling where there was “substantial uncertainty whether and to what extent” pending class action lawsuits were precluded by the Communications Act, as evidenced – in part – by “extensive comments . . . filed by interested parties” in response to Southwestern’s petition). Respectfully, the Consumer and Governmental Affairs Bureau erred by refusing to decide the petition filed by Anda, Inc. on the ground that there is no controversy or uncertainty. *See In re Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, Order, 27 FCC Rcd 4912 (2012); *Anda Petition*.



rule is unclear on the provision's scope, and excluding solicited faxes best comports with the text and legislative history of the TCPA; (2) interpreting Section 64.1200(a)(4)(iv) to apply to solicited faxes would exceed the Commission's statutory authority under the Act; and (3) reading the provision to reach solicited faxes would violate the First Amendment.

1. The Commission should interpret Section 64.1200(a)(4)(iv) to apply only to unsolicited faxes because the language of the rule is unclear in its scope, and excluding solicited faxes best comports with Congress's intent to regulate *unsolicited* faxes.

In relevant part, Section 64.1200(a)(4)(iv) states as follows:

No person or entity may:

...

Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless –

...

A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.<sup>20</sup>

Given the punctuation and varied sentence structure of the rule, the plain text of Section 64.1200(a)(4)(iv) does not make sense as drafted. And because the rule contains references to both unsolicited faxes and faxes sent with express permission, it is impossible to tell from the text alone whether the rule is intended to reach solicited as well as unsolicited faxes.

The *JFPA Order* is equally confusing. The Order makes almost no mention of the rule codified in Section 64.1200(a)(4)(iv) – there is just one short paragraph mentioning the new rule and absolutely no explanation or discussion of the basis for that rule, other than that an opt-out notice is required “to allow consumers to stop unwanted faxes in the future.”<sup>21</sup> But as the Eighth

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<sup>20</sup> 47 C.F.R. § 64.1200(a)(4)(iv).

<sup>21</sup> *JFPA Order* ¶ 48.

Circuit has recognized, the *JFPA Order* is internally contradictory, because elsewhere the Commission explained that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”<sup>22</sup> Given these ambiguities, there is legitimate uncertainty regarding whether Section 64.1200(a)(4)(iv) applies to solicited faxes.<sup>23</sup>

The Commission should end this uncertainty and make clear that Section 64.1200(a)(4)(iv) does not apply to fax advertisements that were sent with the prior express consent of the recipient, as that interpretation best accords with the text and history of the TCPA. As explained above, the TCPA is limited to “unsolicited advertisement[s],” the definition of which expressly excludes any fax advertisement sent with the recipient’s “prior express invitation or permission.”<sup>24</sup> Likewise, the legislative history of the original TCPA enactment makes clear that the purpose of the Act was to address the problem of “*unsolicited*” fax advertisements.<sup>25</sup> And the legislative history of the JFPA is no different, showing that Congress meant only to “[c]reate a limited [EBR] statutory exception to the current prohibition against the faxing of unsolicited advertisements,” and for those “unsolicited advertisements,” to require “notice of a recipient’s ability to opt out of receiving any future faxes containing unsolicited advertisements.”<sup>26</sup> There is no indication whatsoever that Congress was concerned about

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<sup>22</sup> *Id.* ¶ 42 n.154; *see Nack*, 715 F.3d at 684.

<sup>23</sup> *See, e.g., Nack v. Walburg*, No. 4:10CV00478, 2011 U.S. Dist. LEXIS 8266, at \*11 (E.D. Mo. Jan. 28, 2011) (“Reviewing the regulation as a whole, the provision in question . . . purports, on its face, to apply only to unsolicited faxes.”), *overruled by* 715 F.3d 680 (8th Cir. 2013).

<sup>24</sup> 47 U.S.C. § 227(b)(1)&(2); *id.* § 227(a)(5).

<sup>25</sup> S. Rep. No. 102-178 at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970 (“The bill as introduced proposed to ban artificial or prerecorded messages to residential consumers and to emergency lines, and to place restrictions on unsolicited advertisements delivered via fax machine.”).

<sup>26</sup> S. Rep. No. 109-76 at 1 (2005), reprinted in 2005 U.S.C.C.A.N. 319, 319.

communications between businesses and their consenting customers.<sup>27</sup> It is thus unsurprising that the Commission never provided notice, in its notice of proposed rulemaking or elsewhere, that it was even considering applying any regulations to solicited faxes. Accordingly, the Commission should interpret Section 64.1200(a)(4)(iv) to apply only to unsolicited faxes.

2. Moreover, because Section 227(b) of the Communications Act is limited to unsolicited advertisements, interpreting Section 64.1200(a)(4)(iv) to apply to solicited faxes would render that regulation unlawful. By excluding solicited faxes from the reach of Section 227(b), Congress has limited the Commission's regulatory jurisdiction to unsolicited fax advertisements.<sup>28</sup> Indeed, the Commission itself has recognized – in the *JFPA Order* and elsewhere – that the TCPA is limited to unsolicited fax advertisements.<sup>29</sup> If Section 64.1200(a)(4)(iv) were nevertheless applied to solicited faxes, then the rule must be invalidated as *ultra vires* because, simply put, the TCPA does not give the Commission the authority to regulate faxes transmitted with the prior express consent of the recipient.<sup>30</sup> Interpreting Section

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<sup>27</sup> See *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 654-55 (8th Cir. 2003) (reviewing legislative history).

<sup>28</sup> See *Am. Library Ass'n v. FCC*, 406 F.3d 689, 715 (D.C. Cir. 2005) (“[T]he Commission can only issue regulations on subjects over which it has been delegated authority by Congress.”); *ACLU v. FCC*, 823 F.2d 1554, 1571 (D.C. Cir. 1987) (where Congress has addressed a question with a “specific statutory provision,” the Commission lacks the authority to “weigh in” with a contrary regulation on the same subject).

<sup>29</sup> See, e.g., *JFPA Order*, 21 FCC Rcd at 3788-89, 3791, ¶¶ 1-3, 7 (referring multiple times to Commission “rules on unsolicited facsimile advertisements”); 21 FCC Rcd at 3810, ¶ 42 n.154 (opt-out requirements apply only to “communications that constitute unsolicited advertisements”); *JFPA NPRM*, FCC Rcd at 19,758, ¶ 1 (announcing “propose[d] modifications to the Commission’s rules on unsolicited facsimile advertisements”).

<sup>30</sup> See *Nack*, 715 F.3d at 682 (expressing doubt as to whether “the regulation at issue [if interpreted to apply to solicited faxes] properly could have been promulgated” under Section 227(b)); see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013) (explaining that administrative agencies’ “power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction,

64.1200(a)(4)(iv) of the Commission's rules to apply only to unsolicited fax advertisements is thus the only proper reading of the rule.

3. Finally, applying Section 64.1200(a)(4)(iv) to faxes sent with prior express consent would violate the First Amendment, which provides an independent reason to interpret the provision to apply only to *unsolicited* fax advertisements. Under well-established Supreme Court precedent, truthful commercial speech may be burdened only where the government can show that the proposed restriction directly advances a substantial government interest and that the regulation "is not more extensive than is necessary to serve that interest."<sup>31</sup> The Commission has not even tried to meet its burden of building a record to justify applying Section 64.1200(a)(4)(iv) to solicited advertisements, nor has it articulated how requiring an opt-out notice for a solicited fax directly advances an important government interest or why any such interest could not be as well served by a less restrictive requirement.<sup>32</sup> As the Eighth Circuit has suggested and other petitions to the Commission have explained, the balancing of interests regarding unsolicited faxes (the regulation of which has withstood First Amendment scrutiny) and solicited faxes (which the Commission has never tried to defend) is different.<sup>33</sup> Indeed, the government's interest is much weaker where, as here, the consenting customer has already agreed to receive the advertisement and therefore has a simple and effective method of

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what they do is ultra vires"); *id.* at 1871 ("[T]he question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority . . .").

<sup>31</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>32</sup> See, e.g., *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (careful cost and benefit analysis required before speech rights can be burdened); *Edgefield v. Fane*, 507 U.S. 761, 770-71 (1993) (government bears burden to develop record sufficient to justify state interest).

<sup>33</sup> *Nack*, 715 F.3d at 687 ("Suffice it to say, the analysis and conclusions as set forth in *American Blast Fax* would not necessarily be the same if applied to the agency's extension of authority over solicited advertisements."); see *Anda Petition* at 11; *Staples Petition* at 14-16.

communicating an opt-out request to the sender. And even assuming that the same government interest articulated in the context of unsolicited faxes could support the application of Section 64.1200(a)(4)(iv) to solicited faxes (*i.e.*, the government's interest in preventing advertising cost-shifting from businesses to consumers), the opt-out requirement is hardly necessary to meet that interest.

**B. Alternatively, the Commission Should Clarify that the Statutory Basis of Section 64.1200(a)(4)(iv) Is Not 47 U.S.C. § 227(b).**

If the Commission declines to interpret Section 64.1200(a)(4)(iv) to exclude fax advertisements for which the sender has obtained prior express consent, the Commission should at least issue a declaratory ruling that Section 227(b) of the Communications Act is not the statutory basis for its rule. Such a ruling would clarify the Commission's authority for Section 64.1200(a)(4)(iv) while making clear to litigants and the courts that solicited faxes sent without the precise opt-out language described in the Commission's rules cannot form the basis of a private action under the TCPA.

The statutory basis for Section 64.1200(a)(4)(iv) is not clear.<sup>34</sup> The Commission cited eleven different statutory provisions in the *JFPA Order* as authority for the multiple amendments it made to Section 64.1200, of which the addition of Section 64.1200(a)(4)(iv) was only one.<sup>35</sup> It is therefore unclear whether the Commission relied on its authority under Section 227 (which

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<sup>34</sup> As explained in other petitions seeking similar relief, the Commission is obligated under the Administrative Procedure Act to state the statutory basis of its rule. *See* 5 U.S.C. § 553(c); *Anda Petition* at 11-15; *Forest Pharmaceuticals, Inc. Petition For Declaratory Ruling and/or Waiver* at 15-16, *In re Petition for Declaratory Ruling and/or Waiver Regarding Substantial Compliance with Section 64.1200(a)(4)(iii)*, CG Docket No. 05-338 (FCC June 27, 2013).

<sup>35</sup> *See JFPA Order*, 21 FCC Rcd at 3817, ¶ 64 (adopting order “pursuant to the authority contained in sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 201, 202, 217, 227, 258, 303(r), and 332; and sections 64.1200 and 64.318 of the Commission's Rules, 47 C.F.R. §§ 64.1200 and 64.318”).

contains the private right of action provision) in promulgating Section 64.1200(a)(4)(iv), or on one of the other cited provisions.

A clarification by the Commission that its basis for promulgating Section 64.1200(a)(4)(iv) was some statutory provision other than Section 227(b) would serve both the Commission's interests and promote the public's interest in fairness and justice.<sup>36</sup> By making clear that Section 64.1200(a)(4)(iv) is not grounded in the Commission's authority under Section 227(b), the Commission could assist small businesses by removing the threat of massive class action lawsuits based solely on communications with consenting consumers. At the same time, articulating a different statutory basis for the rule would preserve the Commission's ability to enforce the rule as appropriate using its broad, flexible enforcement powers. Purported violations of the rule where there is no actual harm could then still be addressed, but would not be subject to multi-millions of dollars in statutory damages claims. By contrast, declining to clarify the basis of Section 64.1200(a)(4)(iv) leaves the courts to guess at the Commission's exercise of jurisdictional authority, complicating the class action suits that are pending around the country and prejudicing litigants who could otherwise have a clear defense.

## **II. Alternatively, Petitioners Should Be Granted Waivers.**

If the Commission declines to issue a declaratory ruling as discussed above, then Petitioners respectfully request a retroactive waiver of Section 64.1200(a)(4)(iv) for fax advertisements sent since the effective date of the rule for which Petitioners obtained prior express consent.<sup>37</sup> Section 1.3 of the Commission's rules permits the Commission to grant a

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<sup>36</sup> Cf. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (requiring agencies to articulate the basis for its rules can "assist judicial review" and help to ensure "fair treatment for persons affected by a rule").

<sup>37</sup> See *In re United Telephone Co. of Kansas et al.*, Order, 25 FCC Rcd 1648, 1650, ¶ 5 (2010) (retroactive waiver may be issued as long as prior effective date of the waiver is specified); see

waiver for good cause shown, and the Commission should grant a waiver if, after considering all relevant factors, a waiver is in the public interest.<sup>38</sup> Among other things, a waiver is appropriate where “[t]he underlying purpose of the rule(s) would not be served” or “unique or unusual factual circumstances” mandate a waiver to avoid an application of the rule that would be “inequitable, unduly burdensome or contrary to the public interest.”<sup>39</sup> Here, a waiver is appropriate for both reasons.

The only purpose the Commission has articulated for Section 64.1200(a)(4)(iv) is that an opt-out notice is required “to allow consumers to stop unwanted faxes in the future.” Here, Petitioners sent faxes to individuals that had expressly agreed to accept them. There are no allegations that recipients were unaware that they could opt out or that any opt out request was not honored in a timely way. Indeed, the plaintiffs do not even allege that they actually *wanted* to opt out of the advertisements. Thus, even assuming that the goal of Section 64.1200(a)(4)(iv) is to allow consumers to easily revoke prior express consent to receive fax advertisements, that goal would not be served by applying the rule to Petitioners in these circumstances.

At the same time, requiring strict compliance with Section 64.1200(a)(4)(iv) with respect to solicited faxes in these circumstances would be inequitable, unduly burdensome, and contrary to the public interest. Petitioners are facing multi-million dollar class action lawsuits for an alleged failure to include appropriate opt-out notices on faxes sent to plaintiffs who have suffered no actual harm. Where, as here, recipients of fax advertisements had explicitly agreed to receive

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*also In re Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order on Reconsideration, 20 FCC Rcd 5433 (2005).

<sup>38</sup> 47 C.F.R. § 1.3; *In re Rath Microtech Complaint Regarding Electronic Micro Sys., Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16,710, 16,714, ¶ 15 (2001).

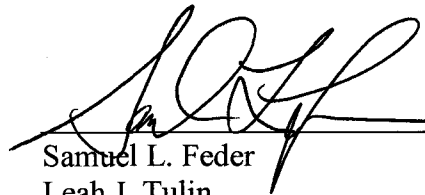
<sup>39</sup> 47 C.F.R. § 1.925(b)(3)(i)-(ii).

them, had the means and ability to revoke their consent at any time, and never expressed any interest or desire to do so, requiring strict compliance with Section 64.1200(a)(4)(iv) would be both tremendously burdensome and inequitable. It would also be contrary to the public interest, as exposing fax senders to massive class action liability for engaging in consensual communications with their customers would work an economic injustice on small businesses and the consumers that they serve.

### CONCLUSION

For the reasons stated above, the Commission should issue a declaratory ruling clarifying (1) that Section 64.1200(a)(4)(iv) of the Commission's rules applies only to unsolicited fax advertisements and/or (2) that Section 227(b) of the TCPA is not the statutory basis for Section 64.1200(a)(4)(iv) of the Commission's rules. In the absence of such a ruling, the Commission should grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any fax sent by Petitioners with the recipient's prior express consent.

Respectfully submitted,



Samuel L. Feder  
Leah J. Tulin  
JENNER & BLOCK LLP  
1099 New York Avenue NW  
Washington, DC 20001  
(202) 639-6000 – Telephone  
(202) 639-6066 – Fax

*Counsel for Douglas Paul Walburg and  
Richie Enterprises, LLC*

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